No. 85-1953

Supreme Court, U.S.
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# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

KANSAS CITY POWER & LIGHT COMPANY,
*Appellant*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
*Appellees*.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

## JURISDICTIONAL STATEMENT

LOWELL L. SMITHSON*
GARDINER B. DAVIS
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100

CHARLES S. SCHNIDER
SPENCER, FANE, BRITT & BROWNE
40 Corporate Woods, Suite 500
9401 Indian Creek Parkway
P. O. Box 25407
Overland Park, Kansas 66225
(913) 345-8100

WARREN B. WOOD
Kansas City Power & Light Company
8730 Nieman Road
Overland Park, Kansas 66214
(913) 888-0326

*Attorneys for Appellant Kansas City Power & Light Company*

*Counsel of Record

May 22, 1986

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

3314

## QUESTIONS PRESENTED

I. Whether Kansas statutes (Kan. Stat. Ann. §§ 66-1,184, 66-1,185) and administrative orders, as well as Sections 202 and 210 of the federal Public Utility Regulatory Policies Act of 1978 ("PURPA") and regulations thereunder, violate either the Taking Clause or the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution—by taking property without just compensation or for private use or by depriving a utility of liberty or property without due process of law—in requiring an electrical utility:

1. Without compensation therefor—to allow a private party (i) physically to enter and use the utility's power line easements or realty, (ii) to make physical connection with the utility's poles, wires and electrical facilities, and (iii) to make physical injections of electrical power into the utility's transmission and distribution system;
2. To make monetary payments (property) to such private party (a "cogenerator") for unreliable electrical power, which is not needed by, not wanted by, and of no value to the utility;
3. Without compensation therefor—to forego the utility's own use of its ample generating capacity and of its transmission and distribution system;
4. To be subjected to any one or more of such requirements without provision in such statutes, orders or regulations for a judicial determination of just compensation;[1] or

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1. This question also is presented in *FCC v. Florida Power Corp., appeal docketed,* No. 85-1658 (U.S. Apr. 9, 1986) and in *Group W Cable, Inc. v. Florida Power Corp., appeal docketed,* No. 85-1660 (U.S. Apr. 9, 1986).

5. To accept an administrative, non-judicial determination of what "compensation" the utility shall receive for the money (property) it is compelled to pay the private party as mentioned above[2] and otherwise to be subjected to each of the remaining requirements above mentioned without provision for either an administrative or a judicial determination of just compensation.

II. Whether the statutes, administrative orders, and regulations mentioned in I above deprive Appellant of liberty or property without due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution (i) by compelling the formation and performance of contracts against Appellant's will, (ii) by embracing means without a real and substantial relation to and in conflict with the statutory end of using fuels other than oil and gas to generate electricity in forcing Appellant to forego burning coal to generate power while allowing private cogenerators to burn oil and natural gas to create the power Appellant must buy, or (iii) by taking Appellant's property without just compensation or for private use.

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2. *Id.*

## PARTIES BELOW

The parties to the proceeding below are as follows:

1. Kansas City Power & Light Company, *Applicant-Appellant.*

2. The State Corporation Commission of the State of Kansas, Michael Lennen, Chairman, Margalee Wright, and Keith R. Henley, Commissioners, and their respective successors in office as the constituent members of the State Corporation Commission of the State of Kansas, *Respondents-Appellees.*

3. American Paper Institute, Inc., *Intervenor-Appellee.*

4. Martin Tractor Company, Inc., *Amicus Curiae.*

Appellant Kansas City Power & Light Company has no parent companies or affiliates. Apart from wholly owned subsidiaries, its only subsidiary is Utility Fuel Company.

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# No. 85-

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

KANSAS CITY POWER & LIGHT COMPANY,
*Appellant,*

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

## JURISDICTIONAL STATEMENT

Appellant Kansas City Power & Light Company ("KCPL") appeals from a final judgment of the Supreme Court of Kansas.

## OPINIONS BELOW

The opinion of the Kansas Supreme Court (App. A1-A19)[3] is reported at 238 Kan. 842, 715 P.2d 19 (1986). The orders of the State Corporation Commission of the State of Kansas ("Appellee Commission") in the predecessor case (App. A20-A59) and in the instant case (App. A75-A81) are unreported, as are the opinions of the Linn County District Court in the predecessor case (App. A60-A64) and the present case (App. A82-A86). The opinion of the Kansas Supreme Court in the predecessor case (App. A65-A74) is reported at 234 Kan. 1052, 676 P.2d 764 (1984).

3. Citations to "App." refer to the separate appendix that accompanies this jurisdictional statement, pursuant to Rule 15.1(j) of this Court.

## JURISDICTION

The judgment of the Supreme Court of Kansas was entered on February 21, 1986. Appellant filed a timely notice of appeal in the Kansas Supreme Court on March 28, 1986 (App. A87-A89). The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U.S.C. § 1257(2).[4]

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following constitutional provisions, statutes, and regulations involved are set forth in the appendix accompanying this statement: the Taking Clause of the Fifth Amendment to the United States Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments thereto (App. A90); Title 16, Sections 796, 824a-3, 824i, 824k, and 2601 of the United States Code (1982) (codifying Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§ 201, 210, 202, 204(a), 2, 92 Stat. 3117 (1978))

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4. The issues concerning the constitutionality of the Kansas statutes and orders were raised by application and brief before the Kansas Corporation Commission and by brief and argument in the Linn County District Court and the Kansas Supreme Court; the Commission and both courts rejected Appellant's Taking Clause and Due Process Clause claims and upheld the constitutionality of the Kansas statutes and regulations as applied in this case. Hence, an appeal lies pursuant to 28 U.S.C. § 1257(2) (1982).

The questions involving the constitutionality of federal statutes and regulations may be considered on this appeal because once this Court has "appellate jurisdiction, [it] also take[s] jurisdiction over any aspects of the case which would otherwise fall solely within [its] certiorari jurisdiction." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 n.14 (1975). If this Court should conclude that this entire case does not fall within its appellate jurisdiction, KCPL requests that this statement be treated as a petition for a writ of certiorari, in which case jurisdiction is invoked under 28 U.S.C. § 1257(3) (1982). *See* 28 U.S.C. § 2103 (1982).

(App. (A90-A111); Title 18, Part 292 of the Code of Federal Regulations (1985) (App. A114-A144); Sections 66-1,184 and 66-1,185 of the Kansas Statutes Annotated (1985) (App. A111-A113); and administrative orders of the Appellee Commission (App. A20-A59, A75-A81).

## STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of Sections 210 and 202 of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. §§ 824a-3, 824i (1982)), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

## STATEMENT OF THE CASE

### A. Overview.

The Appellant is an investor-owned electric utility which functions in the traditional way of selling its own electric power to the public in its certificated sales territory. Appellant has never held itself out to the public as willing to buy power from the public and has never held itself out to the public as willing to provide transmission and distribution service to the public. Appellant is not a common carrier. (App. A164, A158). The Appellee Commission is the state agency which regulates the Appellant within the scope of its holding out.

This appeal concerns interrelated Kansas and federal statutes and regulations (hereinafter sometimes referred to

as the "Scheme")[5] which force Appellant and other electric utilities to purchase electrical power from certain private parties ("cogenerators")[6] and which further require utilities, without compensation, to allow such private parties (i) to enter their property, (ii) to make physical connections with the utilities' poles, wires, and electrical facilities and (iii) to inject such power into the utilities' systems. Further, in the absence of an agreement between a utility and a cogenerator concerning the amount of money required to be paid by the utility for cogenerated power, such amount is, under both the state and federal provisions, to be determined by the state regulatory agency. No provision is made to compensate the utilities for their loss of (i) the right to exclude cogenerators from physical access to utility properties, (ii) the right to prevent cogenerators from making physical connections with utility power lines, poles, and facilities, and (iii) the right to prevent cogenerators from physically injecting power into

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5. The Scheme consists of 1979 Kan. Sess. Laws ch. 170, § 1 (codified at Kan. Stat. Ann. § 66-1,185), 1979 Kan. Sess. Laws ch. 208, § 1 (codified at Kan. Stat. Ann. § 66-1,184), State Corporation Commission of the State of Kansas, Docket No. 115,379-U, orders dated October 15, 1984 (modifying and repromulgating the cogeneration orders in the predecessor case), and November 2, 1984 (denying Appellant's application for rehearing), Public Utility Regulatory Policies Act of 1978, §§ 210, 202 (codified as amended at 16 U.S.C. §§ 824a-3, 824i), and 13 C.F.R. §§ 292.101-.602 (1985). Citations to the appendix hereto for each part of the Scheme are included at pages 2-3 hereof under the heading "CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED".

6. Except where the context clearly indicates otherwise, the terms "cogenerator" and "cogenerators" are used in this Jurisdictional Statement to include qualifying cogeneration facilities and qualifying "small power production" facilities within the meaning of PURPA as well as persons with whom utilities are purportedly obligated to "contract" for "parallel generation services" under Kan. Stat. Ann. § 66-1,184. These terms are further explained at pages 8-10, 6-8 hereof. Under the Scheme, a cogenerator does not have to be a customer of the utility (App. A145, A146).

the utility transmission and distribution systems. In addition, no provision is made to compensate the utilities for the further significant aspect of having to forego their own use of their generating plants and of their transmission and distribution systems—created by substantial investment—so as to absorb the cogenerated power.

The Appellee Commission found that the energy production capacity of the Appellant and other electric utilities in Kansas was surplus to market demand needs for the foreseeable future (App. A33) and thus the cogenerator's power forced upon the Appellant is not wanted, not needed, and of no value to the Appellant. Thus, the cogenerated power is not just compensation for the money taken. Quite independently of the foregoing decisive factors, the Appellee Commission even contended below that, as to cogenerated power being sent into Appellant's system, the Appellant's generating plants could not back down or reduce generation (Appellee's Brief in Kansas Supreme Court at 22; Appellant's Reply Brief in Kansas Supreme Court at 7-8); and thus, even on the Appellee Commission's own theory below, the cogenerated power does not constitute "just compensation" for the money taken from the Appellant and paid to cogenerators, because the Appellant has to generate the same quantity of power with its own generators anyway—and so pay for it twice—and thus receives no benefit.

Further, the statutes, orders and regulations do not provide for any judicial determination of just compensation for any of the takings or deprivations of property rights of the Appellant and other utilities. The only provision made is for an administrative determination of "compensation" for only one item of property taken, namely the money the utility is forced to pay, and the utility is re-

quired to abide by this administrative, nonjudicial determination.[7] As noted, there is no provision for either an administrative or a judicial determination of compensation for any of the remaining property rights lost by or taken from the Appellant and other utilities.

More precisely, the Kansas statutes above mentioned, the Appellee Commission's order of October 15, 1984, PURPA sections 210 and 202, and the FERC regulations promulgated thereunder are interrelated acts of the legislative and executive branches of the state and federal governments, compelling Appellant to allow, or make, physical interconnections of its system with cogenerators, to purchase power from cogenerators, and to submit to certain exactions against its will. Under the full reach of the Scheme, a cogenerator does not have to be an existing or future customer of the utility to force purchases by the utility (App. A145, A146). This Scheme has or authorizes several effects on Appellant and other utilities.

First, the Scheme compels Appellant to pay its money to cogenerators for electricity that Appellant does not want or need and that it cannot rely on receiving at any particular moment. (App. A164, A150). Appellee Commission found that Appellant's energy production capacity was surplus to its market demand needs for the foreseeable future (App. A33, A77). Cogenerators are private persons and are precluded by the Scheme from being designated and regulated as public utilities. 16 U.S.C. § 824a-3(e) (1982). After this money passes to the cogenerators, it becomes their property—no longer that of Appellant, and not that of the public. *Id.* The power is not reliable, is not firm "on peak," is valueless, and is not just compensation for the money taken.

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7. See footnote 1.

Second, the Scheme compels Appellant to permit cogenerators to make physical connections with and to have physical access to Appellant's transmission and distribution system. To comply with the Scheme, Appellant must allow cogenerators to connect their facilities to its own. But for the Scheme, Appellant would be able to deny them these connections with and this access to its property. Kan. Stat. Ann. §§ 66-1602(a), 66-1601(b), 66-1605, 66-1603 (1985). The Scheme does not provide Appellant compensation for this loss of its ability to exclude cogenerators from its property and facilities. Cogenerators, pursuant to 16 U.S.C. § 824a-3(e) (1982), are protected from designation as public utilities and remain private persons engaged in business for profit.

Third, the Scheme requires Appellant to permit cogenerators to make use of its transmission and distribution system and to send electricity physically into its system. But for the Scheme, Appellant, under the Kansas statutes cited in the preceding paragraph, could deny them this particular use of its property. Because the power lines have a finite capacity, Appellant is denied the full use of its property to the extent that electricity from the cogenerators uses such capacity (App. A164, A151). Appellant does not receive compensation under the Scheme for this loss of its ability to exclude these other private persons from its property or for this use of its transmission and distribution facilities.

Fourth, the Scheme requires Appellant to permit agents of the cogenerators to enter upon its real property. The Linn County District Court found:

> [Utilities] would be required to allow other individuals to come upon their property, that is[,] easements, for the purpose of making connections with their lines

for the sale to KCP&L of excess power generated by them.

(Memorandum Decision, May 31, 1985) (App. A85). Though Section 66-1,184 provides that cogenerators may be required to reimburse the utility for some, but not all, of the physical interconnection costs (e.g., not for load research metering costs), the statute makes no provision for reimbursement for the real property rights taken in effecting these mandated physical interconnections and occupations.

Fifth, the Scheme requires Appellant to forego in part the use of its own generating facilities. Appellee Commission has already found that Appellant's energy generating ability is ample. (App. A33 [April 28, 1982, finding that "Kansas electric utilities have surplus capacity at this time and for the indefinite future"], App. A77 [incorporating this finding into its October 15, 1984, order].) Appellant burns coal to produce 96.1% of its electricity. (App. A164, A161). Cogenerators (in the strict sense of the term) may use oil or natural gas to produce all of their electricity, 18 C.F.R. § 292.205 (1985), and "small power producers" may use oil and natural gas for up to 25 percent of their annual total energy input. *Id.* § 292.204 (b)(2). PURPA was intended to reduce consumption of oil and natural gas in generating electric energy. S. Rep. No. 95-442, 95th Cong., 2d Sess. 9 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7903, 7906; H.R. Rep. No. 95-543, 95th Cong., 2d Sess. 22 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7673, 7691.

### B. Statutory and Regulatory Background.

**1. The Public Utility Regulatory Policies Act.** The Public Utility Regulatory Policies Act of 1978

("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978), was enacted by Congress in response to the "energy crisis" perceived to exist at the time. Section 210 of PURPA, codified as amended at 16 U.S.C. § 824a-3 (1982), deals with cogeneration and small power production. PURPA defines "cogeneration facility" as one that produces (a) electric energy and (b) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes. PURPA § 201, 16 U.S.C. § 796(18)(A) (1982). It defines "small power production facility" as one that "produces electric energy solely by the use, as a primary source, of biomass, waste, [or] renewable resources." PURPA § 201, 16 U.S.C. § 796(17)(A) (1982). It defines "qualifying" cogeneration and small power production facilities as those which the Federal Energy Regulatory Commission (hereinafter "FERC") determines to have met FERC requirements regarding factors such as fuel use and fuel efficiency, and which are not owned by regular electric utility companies. 16 U.S.C. § 796(17)(C), (18)(B) (1982). Subsection (e) of Section 210 provides that cogenerators shall not be treated as public utilities within the meaning of federal and state regulatory statutes.

Subsection (a) of Section 210 requires FERC to prescribe such rules as it determines necessary to encourage cogeneration, including "rules requir[ing] electric utilities to offer to . . . purchase" electricity from cogenerators. Subsection (b) provides that the FERC regulations shall require that certain rate-making concepts are followed in setting rates for purchases of electricity by utilities from cogenerators. Subsection (f) requires state regulatory authorities to implement these FERC regulations with respect to electric utilities falling within their respective jurisdictions.

PURPA Section 202 authorizes FERC to order utilities to permit cogenerators to make physical interconnections with their systems. It may also order utilities to increase their transmission capacity on their easements to accommodate such interconnection and use. 16 U.S.C. § 824i (1982). PURPA and this section do not provide for compensation to be paid for any taking of real property effected under color of such orders in making such physical interconnections.

**2. FERC Regulations.**

On February 20, 1980, FERC promulgated rules, 45 Fed. Reg. 12,233 (1980) (codified at 18 C.F.R. §§ 292.101-.602 (1985) (App. A114-A144)), as required by Section 210 of the statute. Subsection (a) of regulation Section 292.303 mandates that "[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a [cogenerator]" at rates to be set by the state regulatory agency.

Regulation subsection (c) mandates physical interconnections, requiring that "any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases" as required by subsection (a). In pertinent part, subsection (c) provides:

> (c) *Obligation to interconnect.* . . . any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

Any reimbursement to the utility for the cost of physically constructing the interconnection would be only as might be prescribed by the state regulatory agency, and that not

necessarily at the time the costs are incurred, but possibly over a "reasonable" period of time. 18 C.F.R. § 292.306 (1985). The FERC regulations do not provide for any compensation for any takings of real property effected under color of orders promulgated pursuant to these regulations.

Regulation Section 292.401 provides that the state regulatory agencies shall implement the interconnection and purchase requirements set forth in the regulations previously cited.

**3. The Kansas Statutes.**

In its first session after the enactment of PURPA, the Kansas Legislature adopted a statute—styled the Natural Gas Policy Act—providing that Appellee Commission would have the jurisdiction necessary to enable it to carry out and comply with the terms of PURPA and the FERC rules and regulations thereunder (e.g., including interconnection requirements and transmission capacity increase requirements). 1979 Kan. Sess. Laws ch. 170, § 1 (codified at Kan. Stat. Ann. § 66-1,185 (1985) (App. A113)).

Later in the same session, the Legislature adopted the Parallel Generation Services Act, which independently mandates physical interconnections with Appellant's system and in part provides:

> Every public utility which provides retail electric services in this state shall enter into a contract for parallel generation service with any person who is a customer of such utility, upon request of such customer, whereby such customer may attach or connect to the utility's delivery and metering system an apparatus or device for the purpose of feeding excess

> electrical power which is generated by such customer's energy producing system into the utility's system.

1979 Kan. Sess. Laws ch. 208, § 1 (codified at Kan. Stat. Ann. § 66-1,184 (1985) (App. A111-A113)).[8] Although the statute states that the cogenerator "may" be required to reimburse the utility for some of the cost of physically interconnecting the facilities, neither of the two Kansas statutes cited makes provision for compensating the utility for the takings of real property and property rights effected under color of these statutes.

**4. The Kansas Corporation Commission's Initial Orders.**

Appellee Commission issued an order dated April 28, 1982 (App. A20-A38), (i) requiring utilities to file tariffs for purchases from cogenerators whose facilities have a design capacity of less than 100 kilowatts, establishing a formula for rates utilities must pay such cogenerators, and mandating such purchases, and (ii) requiring electric utilities to enter into electricity purchase contracts with cogenerators whose facilities have a design capacity of more than 100 kilowatts. The costs of making the physical interconnection—*i.e.*, labor and equipment—were, to the extent deemed reasonable by the Appellee Commission, to be paid by the cogenerator. On November 5, 1982, Appellee Commission issued an order on rehearing (App. A45), affirming the April 28 order in all material aspects.

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8. As the Appellee Commission acknowledges, Section 1,184—dealing with only one of three types of "cogenerators"—does not express the full reach of the Scheme, which does not require every cogenerator to be a customer of the utility in order to force connections with and purchases by the utility (App. A145, A146).

**5. The Predecessor Case.**

After the Appellee Commission's orders had become final, Appellant sought judicial review of these orders, and ultimately in *Kansas City Power & Light Co. v. State Corporation Commission,* 234 Kan. 1052, 676 P.2d 764 (1984) (App. A65-A74), the Kansas Supreme Court vacated the Appellee Commission's orders, upon the ground that the rate at which they would have required utilities to pay cogenerators was in excess of that federally allowed. The Court did not decide the constitutional objections raised in Appellant's first appeal and now again here raised.

**6. The Kansas Corporation Commission's Final Order.**

In an October 15, 1984 order (App. A75-A78), Appellee Commission repromulgated some of the requirements contained in its initial orders vacated by the Kansas Supreme Court, with modifications designed to avoid in the new order the statutory illegality that the Court had found in the rate the utilities had been required to pay cogenerators. Because the modifications the Appellee Commission had thereby made in its initial orders were not responsive to KCPL's constitutional objections, KCPL continued to press these objections. On October 23, 1984, Appellant moved for rehearing by Appellee Commission (App. A148) and on November 2, 1984, the application was denied (App. A79-A81).

**7. This Litigation.**

After the Commission's October 15, 1984 order became final, Appellant sought judicial review of the order in the Linn County District Court. On May 31, 1985,

the court held that the order was valid (App. A82-A86), and this determination was affirmed by the Kansas Supreme Court on February 21, 1986 (App. A1-A19). This appeal followed.

## THE QUESTIONS ARE SUBSTANTIAL

### A. Overview.

The Court should note probable jurisdiction of this appeal, (i) because the constitutional questions here presented under the Taking Clause of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment have not been decided by this Court either as to PURPA or any state statute or regulation implementing PURPA and so are novel, (ii) because the existing Supreme Court decisions as to similar regulatory schemes, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-37 & n.13 (1982); *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937), and other key precedents, *Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985), *appeal docketed*, Nos. 85-1658, 85-1660 (U.S. Apr. 9, 1986); *Beattie v. Shelter Properties, IV*, 457 So. 2d 1110, 1113 [3] (Fla. Dist. Ct. App. 1984); *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates Ltd.*, 451 So. 2d 1034, 1036, 1035 n.1 (Fla. Dist. Ct. App. 1984), demonstrate substantial merit in Appellant's constitutional positions and conflict with and error in the decision of the Court below, (iii) because one of the major issues in *Florida Power, supra,* now docketed in this Court, under the similar 1978 Pole Attachments Act—namely the Eleventh Circuit's decision that the statute and regulations violate the Fifth Amendment Taking Clause by failing to allow for a judicial determination of what constitutes just compensation

—is a key constitutional issue raised herein by this Appellant, (iv) because this Court may thus avail itself of the opportunity to render a comprehensive and clear decision putting to rest novel constitutional issues involving the cable television industry under the 1978 Pole Attachments Act of Congress and an incipient cogeneration industry under PURPA and state statutes and regulations purportedly seeking to implement PURPA, (v) because the constitutional questions under the Fifth and Fourteenth Amendments to the United States Constitution as to the deprivation of a utility's freedom not to contract, outside the scope of its holding out, have never been decided by this Court under PURPA or any of the state statutes or regulations purportedly implementing PURPA, (vi) because the issue of the constitutional validity of forcing this Appellant, which burns coal to produce over 96% of its electricity, to back down upon such coal-fired generation to make mandated purchases of power from cogenerators authorized to burn oil and gas, thus applying to the Appellant means in conflict with and having no rational relation to the statutory end of decreasing the use of oil and gas for the generation of electric power, has never been decided by this Court, and (vii) because, in view of the invasions of liberty and property now nationally underway under color of PURPA, this Court properly needs to decide whether the following words of Justice Holmes are still alive:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

**B. The Statute and Regulations Upheld Below Effect Takings of Appellant's Property Without Just Compensation and for Private Use and Without a Judicial Determination of Compensation, in Violation of Amendment V of the United States Constitution, As Applied to the States by Amendment XIV of the Constitution.**

First, the statutory and regulatory Scheme under consideration here calls for the taking of interests in real property without compensation therefor and for the transfer of these interests to private persons. The electric utility is required to allow a private party, the cogenerator, (i) physically to enter to use its power line easements or realty, (ii) to make physical connection with its poles, wires and electrical facilities, and (iii) to make physical intrusions of electrical power into its transmission and distribution system. Indeed, the District Court here expressly ruled:

> It is true that they would be required to allow other individuals to come upon their property, that is easements, for the purpose of making connections of their lines for the sale to KCP&L of excess power generated by them.

(App. A85). Absent the Scheme, Appellant would be able to deny cogenerators these connections with and this access to its property. Kan. Stat. Ann. §§ 66-1602(a), 66-1601(b), 66-1605, 66-1603 (1985). No compensation to the utility is provided in the Scheme for the taking and loss of such rights of permanent physical access to its

property and its electrical facilities.[9] Again, these prosions run afoul of the guarantees set forth in the Fifth Amendment and applied to the states by the Fourteenth Amendment. This Court recently reaffirmed the rule that such a permanent physical occupation authorized by government is a taking, without regard to the public interest it may serve, without regard to the amount of space occupied, and without regard to any minimal economic impact on the owner. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-37 & n.13 (1982). In short, Justice Marshall in *Loretto* wrote for this Court:

> We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

*Id.* at 426.[10] Relying in part upon *Kaiser Aetna v. United*

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9. The provision of the Scheme calling for the cogenerator to pay some of the mere costs of creating the physical interconnections has been held in similar cases not to be compensation for the taking (from the owner's perspective) of the property right to exclude or to be free of such connection or (from the private cogenerator's perspective) of the right of physical interconnection and the right of such physical access. *Beattie*, 457 So. 2d at 1113 [3]; *Storer*, 451 So. 2d at 1036, 1035 & n.1. Thus the state statutes and regulations implementing Section 202 of PURPA, though providing that cogenerators pay some of the cost of labor and equipment required for such physical interconnections, do not satisfy the just compensation requirement of the Fifth Amendment.

10. Justice Marshall explained that the word "permanent" in the rule only meant that the party desiring to make or maintain the physical intrusion could do so as long as such party desired so to do, whether or not the owner consented. *Id.* at 439 & n.17. Such is true of cogenerators. See also *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1543, 1544 (11th Cir. 1985), *appeal docketed*, Nos. 85-1658, 85-1660 (U.S. Apr. 9, 1986).

*States,* 444 U.S. 164, 176, 179-80 (1979), Justice Marshall emphasized that an order's right to exclude was "one of the most essential sticks in the bundle of rights commonly characterized as property." 458 U.S. at 433. As a result, just compensation to the owner is required. U.S. Const. amend. V. Since no constitutional compensation is provided here, and since each of the takings is for private use, the cogeneration statutes and regulations are invalid as authorizing unconstitutional takings in violation of the Taking Clause.

Second, this statutory and regulatory Scheme forces Appellant to pay money (property) to private persons while receiving nothing of value in return. These payments, while nominally to be made in exchange for electrical power which Appellant is required to purchase, in fact yield Appellant power which it does not want or need and that it cannot rely on receiving at any particular moment (App. A164, A150). Because the Appellee Commission has already found that the energy production capacity of Appellant and the other electric utilities in Kansas exceeds market demand for the foreseeable future, any additional power from cogenerators provides absolutely no benefit to Appellant. Yet, the statutes and regulations being challenged in this case force Appellant to make the required payments to cogenerators irrespective of whether any benefit is received in return.[11] When presented with a similar regulatory scheme in the case of *Thompson v.*

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11. The Appellee Commission even contended below (Appellee Commission's Brief in Kansas Supreme Court at 22; Appellant's Reply Brief in Kansas Supreme Court at 7-8) that Appellant could not back down or reduce its level of generation by using the amounts of cogeneration energy being supplied, so, on the Appellee Commission's theory, the Appellant pays twice for the energy; and the cogenerated energy is thus not "just compensation."

*Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), this Court struck it down as a violation of the Taking Clause. *Id.* at 78-79. Justice Brandeis, writing for a unanimous Court, held:

> The pipeline owner, a private person, is, *in effect,* ordered to pay *money* to another private well owner *for the purchase* of oil *which there is no wish to buy* . . .
>
> The Order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, *the State takes from the pipeline owner the money with which the purchase is made,* the money lost through curtailed use of properties developed at large expense, money lost because of the drainage away from his land of the gas which he is forbidden to produce for himself, but must buy from those towards whose land it migrates.
>
> *Our law reports no more glaring instance of the taking of one man's property and giving it to another.*

*Id.* at 78-79 (emphasis supplied). It may be noted that in this very similar scheme the money taken was to be exchanged for oil and gas, just as the money taken here is to be exchanged for power. The scheme in *Thompson* was held invalid as a taking both for private use as well as without providing just compensation. *Id.* at 78. Just as the plaintiff in *Thompson* was not a common carrier of gas and oil or a utility holding itself out to purchase gas and oil from the public, so KCPL is not a common carrier as to power or a utility holding itself out to purchase power from the public. The regulatory Scheme at issue

here thus suffers from the same constitutional infirmities as the scheme struck down in *Thompson.*

A third aspect of the Scheme here at issue violates Appellant's rights under the Fifth and Fourteenth Amendments. Not only do the statutes and regulations call for the taking of Appellant's property (money), but they would have an administrative agency—Appellee Commission—determine the compensation to be received for this taking. Such a procedure is constitutionally impermissible; as the Eleventh Circuit Court of Appeals recently noted in striking down a similar statute, "the determination of what constitutes just compensation is a decision which has been jealously guarded as being solely within the parameters of the judicial function." *Florida Power Corp. v. FCC,* 772 F.2d 1537, 1544-45 (11th Cir. 1985), *appeal docketed,* Nos. 85-1658, 85-1660 (U.S. Apr. 9, 1986). The Fifth Amendment—made applicable to the States by the Fourteenth Amendment—requires that this question be determined and resolved in a court of law, not in an administrative agency. The Scheme is thus invalid.

Fourth, the rule of or standard for determining what constitutes "just compensation" is likewise a question that is reserved for the judiciary; as the United States Court of Claims recently reaffirmed, "It does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." *Miller v. United States,* 620 F.2d 812, 837 (Ct. Cl. 1980). PURPA's legislative prescription for compensation in 16 U.S.C. § 824a-3(b) (1982)—refined by labyrinthine FERC regulations, 18 C.F.R. § 292.304 (1985), and implemented by Appellee Commission under color of state law, Kan. Stat. Ann. §§ 66-1,184, 66-1,185 (1985)—unconstitutionally in-

vades this exclusively judicial function.[12] The Scheme thus fails to satisfy the requirements of the Taking Clause.

Because the statutes and regulations here at issue require Appellant to make monetary payments to private parties for a product which has no value to Appellant, because the compensation to be received by Appellant for this taking is determined in administrative, rather than judicial, proceedings under nonjudicial standards, and because appellant is required, without compensation, to allow private parties to have permanent physical access to its easements and facilities and to forego use of its ample generating facilities and transmission and distribution systems, the Scheme violates Appellant's rights under the Taking Clause and should be invalidated.

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12. For example, substantively, no provision is made for compensation for any real property interests taken or for cogenerated power to be paid for at "fair market value" (or at any other constitutionally acceptable measure). In short, the Scheme requires payment of avoided cost, though constitutional compensation may be less, if the state regulatory body does not determine such lesser value is sufficient to encourage cogeneration and small power production. The orders entered by Appellee Commission adopt an avoided cost and not the fair market value measure of compensation. (App. A27-A34, A38, A76-A78). This Court has ruled that the "just compensation" required by the Fifth Amendment "means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 10 (1984).

### C. The Statutes and Regulations Upheld Below Deprive Appellant of Its Freedom of Contract by Imposing Contracts on Unwilling Parties and Dictating the Terms of Those Contracts, and, As Applied to Appellant, They Lack a Rational Relation Between Their Stated Ends and the Means Adopted to Achieve Those Ends, in Violation of the Due Process Clauses of Amendments V and XIV to the United States Constitution.

The cogeneration statutes and regulations further violate Appellant's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. Because the cogeneration Scheme would impose a contract on an unwilling party, dictate the terms of the contract, and require its performance, and because the Scheme is not reasonably calculated to further the ends articulated in PURPA's legislative history, it fails to comport with due process and should be struck down.

This Court has held that freedom of contract is an aspect of the "liberty" protected under the Due Process Clause. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 572 (1972). The freedom to contract perforce includes the freedom *not* to contract. *See, e.g., Shaitelman v. Phoenix Mut. Life Ins. Co.,* 517 F. Supp. 21, 25 (S.D. N.Y. 1980). While government may impose reasonable restrictions on contracts once they are freely negotiated and existing, *Highland v. Russell Car & Snowplow Co.,* 279 U.S. 253, 261 (1929), it is a far different matter for government affirmatively to impose a contract upon and to make an entire contract for an involuntary party. The statutes and regulations under consideration here would do precisely this. Not only do they infringe upon Ap-

pellant's right to exercise its own discretion as to the parties with whom it does business, *see Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980), but they go much further: they create each and every feature of a contract and then require its performance.[13] Such a Scheme violates Appellant's due process rights.

The cogeneration Scheme further lacks any reasonable relation to its ostensible legislative ends; in fact, the means it adopts are contrary to the ends identified in PURPA's legislative history. The bill was designed to decrease the nation's use of oil and natural gas for the generation of electric power, S. Rep. No. 95-442, 95th Cong., 2d Sess. 9 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7903, 7906, to the end of "sav[ing] a significant amount of scarce natural gas and reduc[ing] importation of petroleum by 1985 and in future years." H.R. Rep. No. 95-543, 95th Cong., 2d Sess. 22 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 7673, 7691. Appellant, however, uses coal to produce over 96% of its electricity (App. A164, A161), while many cogenerators produce their power by burning oil and natural gas. As applied to Appellant, the statutes and regulations here under review therefore act to encourage the burning of oil and natural gas to generate electricity—precisely contrary to the stated goal of the PURPA legislation. The Scheme thus lacks any real and substantial relation between the means it imposes and the objectives asserted to justify them, and it therefore fails to satisfy due process.

Because the statutory and regulatory Scheme under consideration here deprives Appellant of its freedom of contract—a liberty interest protected under the Fifth and

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13. As shown in Point B, the performance of the "contract" violates the Taking Clause.

Fourteenth Amendments—and because the Scheme lacks a reasonable relation between its stated ends and the means adopted, it fails to comport with due process and should be struck down.

## CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

LOWELL L. SMITHSON*
GARDINER B. DAVIS
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100

CHARLES S. SCHNIDER
SPENCER, FANE, BRITT & BROWNE
40 Corporate Woods, Suite 500
9401 Indian Creek Parkway
P. O. Box 25407
Overland Park, Kansas 66225
(913) 345-8100

WARREN B. WOOD
Kansas City Power & Light Company
8730 Nieman Road
Overland Park, Kansas 66214
(913) 888-0326

*Attorneys for Appellant Kansas City Power & Light Company*

*Counsel of Record

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